UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE:

FLORIDA FIRST CITY BANKS, INC., CASE NO.: 20-30037-KKS
CHAPTER: 11

Debtor.
_____/

ORDER CONDITIONALLY APPROVING BID PROCEDURES AND SCHEDULING HEARING TO CONSIDER APPROVAL OF SALE OF ASSETS (Doc. 11)

This Case came before the Court for evidentiary hearing on February 4, 2020 upon the *Motion for Orders Pursuant to 11 U.S.C. §§ 105(a) and 363(b); Fed. R. Bankr. P. 2002, 6004, 9014, and 9019; (I) Approving (A) Bidding Procedures and (B) the Form and Manner of Notice of (i) the Sale of Certain Assets and (ii) Granting Related Relief; (II) Authorizing and Approving (A) the Sale of Certain Assets; (III) Waiving the 14-day Stay of Fed. R. Bankr. P. 6004(h) and Request for Emergency Hearing to Consider Bidding Procedures* ("Bid Procedures Motion," Doc. 11), and the objections and memoranda filed in support and opposition. By the Bid Procedures Motion, Debtor asks the Court to approve bid procedures and an ultimate sale of its only asset on an

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expedited basis, over the objection of its one unsecured creditor, which as of this date is to receive nothing from a sale or under a Chapter 11 plan.

Arguments at the hearings and in memoranda of Debtor and the stalking horse bidder paint this picture: The Court can let the patient [the Bank owned by Debtor] die by denying the Bid Procedures Motion, or keep it alive and allow it to thrive by permitting a sale on an expedited basis. Ruling on the Bid Procedures Motion requires balancing interests of non-debtor third parties—employees and customers of the bank, the communities in which it operates, and to a large (but unmentioned) degree the stalking horse bidder and shareholders of Debtor—and the overall objectives and purpose of Chapter 11 of the Bankruptcy Code. Based on the totality of the circumstances, the Court chooses to keep the patient alive for now by approving bid procedures and scheduling a hearing to consider a sale.

FACTUAL HISTORY[1]

Debtor is a bank holding company. Its only asset consists of shares in its wholly owned subsidiary, First City Bank of Florida ("First City

[1] The facts contained in this Order derive from the pleadings, case Docket, testimony and documentary evidence received at the evidentiary hearing held on the Bid Procedures Motion on February 4, 2020. So as not to delay this ruling, the Court writes this Order without specific references to the record.

Bank"), which operates two bank branches in Okaloosa County, Florida. First City Bank has an unknown number of employees; Debtor has none. Debtor has two creditors: 1) First National Bank ("FNBB"), which holds a claim in excess of $5.7 million secured by a lien on Debtor's stock in First City Bank; and 2) Wilmington Trust Company ("Wilmington"), which through TruPS (Trust Preferred Securities) holds an unsecured claim of approximately $6.95 million.

First City Bank has been struggling financially for at least the past ten (10) years. It has not paid a distribution to Debtor since 2007. In 2017, First City Bank signed a modification of an FDIC "cease and desist" order, to which the Florida Office of Financial Regulation is also a party. First City Bank is undercapitalized. Additionally, it has approximately $17 million of OREO property in its portfolio, of which approximately $10 million will "come off the books" in March or April of this year (2020). According to testimony at the hearing, once this occurs, First City Bank's Tier 1 Capital Ratio will fall below the minimum threshold of 2%, thus making seizure by the FDIC a relative surety.

PROCEDURAL HISTORY

Debtor filed its Chapter 11 petition on January 15, 2020, and its Bid Procedures Motion the next day, along with a request for an

emergency or expedited hearing.[2] The Court held a preliminary hearing on January 22, 2020 and final evidentiary hearing on February 4, 2020. Wilmington and the U.S. Trustee objected to the Bid Procedures Motion; the stalking horse bidder, Beach Community Bank ("BCB"), filed a response in support of the Bid Procedures Motion.[3]

THE BID PROCEDURES MOTION AND PROPOSED SALE

Debtor seeks approval to sell its only asset, 100% ownership of First City Bank, to BCB for $100,000.00, to be derived from $100,000 worth of BCB stock. Debtor requested a sale hearing within thirty (30) days of the initial hearing on the Bid Procedures Motion, which would have been thirty-seven (37) days post-petition. As the stalking horse bidder, BCB is entitled to a breakup fee in the amount of $25,000 and the right to assert an administrative claim for costs not to exceed $300,000.00; if other bidders appear, the bidding will be in $100,000 increments.[4] The ultimate sale would be subject to the terms of final orders approving bid procedures and sale. Among other things, the Bid Procedures Order submitted by Debtor allows for the possibility of third-party bidders and

[2] In the interests of time, the Court will not include references to documents of Record.
[3] Debtor, BCB, and Wilmington have submitted additional briefing the Court requested at the conclusion of the evidentiary hearing.
[4] Debtor and BCB had originally agreed to and requested approval of a breakup fee of $500,000 but reduced that to the current $25,000 as part resolution of the U.S. Trustee's objection.

an auction at a sale hearing. In the Bid Procedures Motion Debtor states that the sale proceeds will be distributed to its creditors after allowed administrative expenses are paid. What will really happen if the Court approves the sale as provided is that the sale proceeds, net of allowed administrative expenses, will be paid to FNBB, and the unsecured creditors, consisting solely of Wilmington, will receive nothing.

As part of its resolution of the objection of the U.S. Trustee, Debtor has agreed to file a Chapter 11 plan no later than March 1, 2020.

ANALYSIS

Bankruptcy courts routinely approve sales of assets out of the ordinary course of business in Chapter 11 cases. Sales of all, or virtually all, of a debtor's property pursuant to a motion rather than Chapter 11 plan are subject to special scrutiny. Special circumstances must exist to approve sales on an expedited or emergency basis. Cases are fact specific; there is no one size fits all. As one court succinctly put it,

> The difficulty … is not the decision to sell the debtor's assets in bankruptcy rather than through a nonbankruptcy UCC sale or the skill of the attorneys in identifying their client's interests and endeavoring to maximize them, but in recognizing the proper line between sales under § 363 before the confirmation of a chapter 11 plan and sales under § 1123(a)(5)(D) after confirmation of a chapter 11 plan.[5]

[5] *In re On-Site Sourcing, Inc.,* 412 B.R. 817, 822 (Bankr. E.D. Va. 2009).

Evidence and facts are key. In the seminal case on § 363(b) sales, *In re Lionel Corp.,* the Second Circuit Court of Appeals stated:

> The rule we adopt requires that a judge determining a § 363(b) application expressly find from the evidence presented before [her] at the hearing a good business reason to grant such an application.
> …
>
> In fashioning its findings, a bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, [s]he should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike. [Sh]e might, for example, look to such relevant factors as the proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-a-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasing or decreasing in value. This list is not intended to be exclusive, but merely to provide guidance to the bankruptcy judge.[6]

Using that guide and focusing on the factor considered most important by the *Lionel* court, this Court will approve bid procedures, allow Debtor to pursue sale of its only asset on an expedited basis, and reserve objections for any sale hearing. Although why the proposed sale

[6] *Committee of Equity Security Holders v. The Lionel Corp. (In re Lionel Corp.)*, 722 F.2d. 1063, 1070-71 (2nd Cir. 1983).

is an emergency after First City Bank has been struggling for ten (10) years remains somewhat of a mystery, the evidence is clear: if the Court does not approve bid procedures and schedule a sale hearing, Debtor's shares in First City Bank not only will decrease in value, but may lose all value if a sale is not closed soon. To assist the parties in preparing for an eventual sale hearing, the Court sets forth its view of the evidence and arguments presented to date.

In the Bid Procedures Motion Debtor asserts that during the past ten (10) financially dismal years it has been "diligently" pursuing alternative solutions. This appears true. At the hearing, Debtor urged that it has been diligently pursuing prospective purchasers and a sale of the bank. This is debatable. Although Debtor retained a "marketing professional" who identified numerous prospective purchasers and negotiated deals with two, that professional's efforts were only during a ten-month period between October of 2017 and August of 2018.[7] The timeline jumps from August of 2018 to August of 2019 when Debtor and BCB entered into a non-disclosure agreement leading up to the proposed

[7] This marketing professional, known to the Court only as "Mr. Tuck," did not attend or testify at the hearing. The only evidence of his existence and efforts are contained in the Declaration of Robert E. Bennett, Jr. filed in support of the Bid Procedures Motion, to which is attached redacted time records apparently prepared by Mr. Tuck. Absent live testimony from Mr. Tuck, who did not appear as a witness, it is very difficult to determine how much active marketing he performed.

sale now before the Court. There is no evidence that Debtor attempted to sell the shares in First City Bank before 2017, even though the bank was in financial distress long before.

One of the reasons Debtor and BCB urge an expedited sale process is because First City Bank is undercapitalized. In addition, $10 million of the bank's OREO real estate assets must, according to the bank President, go "off the books" this March or April, having been on the books for ten (10) years. Debtor offered no detailed explanation as to why the bank has not yet sold this real estate or scheduled it for auction before now.[8]

Debtor's and BCB's urging that a sale date within thirty (30) days is critical, that Debtor has been actively trying to sell the shares since 2009,[9] and that "$100,000 is the best price obtainable for the stock,"[10] are not entirely supported by the evidence.

As to the necessity for a sale within thirty-seven (37) days post-petition, Debtor presents conflicting evidence. In support of the Bid Procedures Motion, Mr. Bennett declares that "[t]he longer the sale is

[8] The only testimony in this regard the Court can recall was that this is predominantly commercial real estate and difficult to sell.
[9] Doc. 65, p. 2.
[10] Doc. 66, p.4.

pending, the greater the risk of panic among Bank account holders … ."[11] This avowal appears contrary to Mr. Bennett's later assertion that "[t]he Debtor's financial distress and solicitation of buyers for the Stock was public knowledge … since 2009" due in part to "public notices in both newspapers of general circulation in Fort Walton Beach, where the Bank is located … ."[12] If First City Bank's financial distress has been known in the community since 2009, it is somewhat implausible that customers will start to panic now, ten (10) years later.

The only evidence of Debtor's pre-petition marketing efforts is that showing the marketing professional's actions in 2017 and 2018. Since signing the merger agreement with BCB in January of 2020, Debtor has been prohibited from offering the shares to any other party, specifically including those that its marketing professional contacted in 2017-2018.[13]

The case law Debtor and BCB cite is distinguishable; none of their cases show courts approving sales of a Chapter 11 debtor's only asset

[11] *Bennett Declaration,* Doc. 62, ¶6.
[12] *Id.* at ¶12. *See also* Doc. 66, p. 5.
[13] The merger agreement provides that Debtor "shall not, and shall cause its Affiliates and its and their representatives not to, (a) solicit or negotiate with" any other party regarding sale of the shares, specifically including the 71 interested parties contacted by Debtor's marketing professional in 2017-2018, unless authorized to do so in a "Bidding Procedures Order." Doc. 12, at p. 12, ¶ (aaaa); p. 33, ¶ 5.17. Debtor apparently did not attempt to locate other prospective purchasers after signing a confidentiality agreement with BCB in August of 2019.

with no money going to unsecured creditors. For example, *In re Collins* involved a sale of only some of the debtor's numerous parcels of real estate. The same is true for *In re Terrace Gardens,* where the sale was of only two of six office buildings. In *In re Action Drug,* the court found that news was out on the street about the debtor's financial difficulties because of the small niche market occupied by that debtor, making it obvious that interested parties had known the asset was for sale. The court in *In re Daily Gazette* recognized that the sale preserved the "largest circulation newspaper in the capitol city," unlike here, where this small bank has only two branches. Even the court in *On-Site Sourcing* held, in part, that the single asset sale should "benefit the estate."[14]

Although in the Bid Procedures Motion Debtor urges that approval of the bid procedures and sale will benefit the estate, in its memorandum it concedes that any benefit is to non-debtor parties and, as to Debtor, tangential, at best. There appear no reported decisions in which courts have approved § 363(b) sales of 100% of a debtor's assets over objection of unsecured creditors to be paid $0. As Wilmington illustrates, other

[14] In *On-Site Sourcing,* the sale was not all, but "almost all" of the debtor's assets. The sale price was $28 million and the lien on the assets sold was $35 million. The unsecured creditors did not object to the sale, but rather demanded a $132,000 carve-out, which would have put them ahead of priority and administrative claims. 412 B.R. 817 (Bankr. E.D. Va. 2009).

courts have denied approval of expedited bid and sale timelines like those proposed by Debtor. *See e.g. In re GSC, Inc.* and *In re Blixseth.* Even in BCB's own prior Chapter 11 case in this District, in order to achieve a sale BCB retained an investment banker to market the bank shares, that individual marketed to 297 entities, and the Court found that BCB had conducted an "open and competitive bidding process."[15] For the reasons set forth above, it is

ORDERED:

1. The Bid Procedures Motion is granted conditioned on the terms of this Order, in addition to the revised terms announced by the parties and approved by the Court at the February 4 hearing.

[15] *Beach Community Bankshares, Inc.,* Case No. 18-30334-HAC, *Order Granting Motion or Orders Pursuant To 11 §§ U.S.C. 105(a) and 363(b); Fed. R. Bankr. P. 2002, 6004, 9014 and 9019; (I) Approving (A) Bidding Procedures and (B) the Form and Manner of Notice of (I) the Sale of Certain Assets and (ii) Granting Related Relief; (II) Authorizing and Approving (A) the Sale of Certain Assets; (III) Waiving the 14-Day Stay of Fed. R. Bankr. P. 6004(g) and Granting Related Relief (Doc. 6)*, Doc. 72, pp. 11-12 (Bankr. N.D. Fla., May 22, 2018). *See also In re: Premier Bank Holding Company*, Case No. 12-40550-KKS, *Order Granting the Debtor's Motion for Order's Pursuant to 11 U.S.C. §§ 105 and 363(b) and Fed. R. Bankr. P. 2002, 6004, and 9014 (I) Approving (A) Bidding Procedures and (B) the Form and Manner of Notice of the Sale of Certain Assets and Granting Related Relief; (II) Authorizing and Approving the Sale of Certain Assets; and (III) Waiving the 14-day Stay of Fed. R. Bankr. P. 6004(h) (Doc. 14)*, Doc. 132, pp. 4-5 (Bankr. N.D. Fla. Nov. 29, 2012) (approving a sale pursuant in part to the debtor's retention of a financial adviser and extensive testimony as to its post-petition marketing efforts).

2. As expeditiously as possible, and no later than ten (10) business days from the date of this Order, Debtor shall retain an investment banker or other professional with expertise in marketing bank shares to produce and disseminate marketing materials containing current information about the shares to be sold.
3. Such marketing professional shall contact and provide marketing materials, including the Final Bid Procedures Order and Notice of Sale, to, at minimum, all prospective purchasers previously contacted by Mr. Tuck, and will report the results of his/her efforts to Debtor weekly. Debtor or its counsel will provide copies of these reports to Wilmington or its counsel, to be held in confidence and not disseminated to third parties without consent of Debtor or Court approval.
4. The Court will conduct a sale hearing at the United States Bankruptcy Courthouse, 110 East Park Avenue, Tallahassee, Florida on March 26, 2020, beginning at 10:00 a.m. EST.
5. All objections to the sale are preserved for the sale hearing.
6. Counsel for Debtor or BCB shall prepare and submit a revised, detailed Bid Procedures Order similar in form to that

filed with the Motion and consistent with this ruling, after having the form of order approved by counsel for the U.S. Trustee and Wilmington. Debtor may also file and serve a Notice of Sale.

7. If the parties have any questions about this ruling or the terms of a Bid Procedures Order, counsel may contact chambers and request the Court to schedule an expedited telephonic hearing.

DONE and ORDERED on February 14, 2020.

KAREN K. SPECIE
Chief U.S. Bankruptcy Judge

cc: All interested parties.